

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SCOTT MAIONE and TASHA OSTLER,
(On Behalf of Their Infant Children)

Plaintiffs,

-against-

DR. HOWARD A. ZUCKER, Commissioner of the New
York State Department of Health, The New York State
Department of Health, SAMUEL D. ROBERTS,
Commissioner of the New York State Office of Temporary
and Disability Assistance-Office of Administrative
Hearings, The Office of Temporary and Disability
Assistance-Office of Administrative Hearings, JOAN
SILVESTRI, Commissioner, Rockland County Dept. of
Social Services, and Susan Sherwood, Former
Commissioner of Rockland County Dept. of Social
Services,

Defendants

18-CV-07452 (KMK) (PED)

**NOTICE OF MOTION TO
DISMISS THE SECOND
AMENDED COMPLAINT**

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PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law and the declaration of John Gasior, sworn on June 4, 2021, and upon all prior pleadings and proceedings had herein, defendants the New York State Department of Health (“DOH”), Dr. Howard Zucker, as Commissioner of DOH, the New York State Office of Temporary and Disability Assistance (“OTDA”), Michael P. Hein, as Commissioner of OTDA,¹ and Samuel D. Roberts, former Commissioner of OTDA (collectively “State Defendants”), will move this Court before the Honorable Kenneth M. Karas, United States District Judge, at the United States Courthouse for the Southern District of New York, located at 300 Quarropas Street, White Plains, New York 10601, for an Order pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil

¹ Michael P. Hein is the current commissioner of OTDA and, as the successor to Samuel D. Roberts, Mr. Hein is automatically substituted as a party for those claims that were asserted against Mr. Roberts in his official capacity as OTDA’s commissioner. See Fed. R. Civ. P. 25(d).

Procedure, dismissing Plaintiffs' Second Amended Complaint against State Defendants on the grounds that: (1) the Second Amended Complaint fails to correct the “defects” identified in the Court’s September 25, 2020 Opinion and Order (Maione v. Zucker, No. 18-cv-7452 (KMK), 2020 WL 5751582, *10 (S.D.N.Y. Sept. 24, 2020)); (2) claims asserted are barred by the doctrines of res judicata and collateral estoppel; (3) claims asserted are barred under the Rooker-Feldman doctrine; (4) claims are barred by the Eleventh Amendment; (5) OTDA, OTDA Commissioner Hein and former OTDA Commissioner Roberts are not proper parties to this action; (6) Plaintiffs have no claims against DOH Commissioner Zucker, OTDA Commissioner Hein or former OTDA Commissioner Roberts in their personal capacities; (7) Plaintiffs’ due process rights have not been violated; (8) Plaintiffs’ do not have viable ADA and Rehabilitation Act claims; (9) Plaintiffs claims based on the New York State Constitution are barred by the Eleventh Amendment.

PLEASE TAKE FUTHER NOTICE that oral argument will be on a date and at a time designated by the Court.

PLEASE TAKE FURTHER NOTICE that opposing affidavits and answering memoranda of law, if any, shall be filed on or before June 30, 2021, and State Defendants' reply affidavits and memoranda of law shall be filed on or before July 14, 2021.

Dated: New York, New York
June 4, 2021

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York
Attorney for State Defendants

By: /s/ John Gasior
John Gasior
Assistant Attorney General

28 Liberty Street
New York, New York 10005
212-416-8570
john.gasior@ag.ny.gov